

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-2125

To be argued by
Stanley L. Kantor

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Original

Docket No. 75-2125

UNITED STATES OF AMERICA, ex rel.
THOMAS F. BYNES,

Petitioner-Appellant,

-against-

HAROLD J. SMITH, Superintendent, Attica
Correctional Facility,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE



SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

STANLEY L. KANTOR
Assistant Attorney General
of Counsel

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. N. (212) 488-5168

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BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

Petitioner-appellant [hereafter "petitioner"]
has appealed to this Court from an order of the United States
District Court for the Eastern District of New York (Weinstein,
D.J.), dated June 26, 1975, dismissing, without a hearing,

petitioner's second application for federal habeas corpus relief (A-1).^{*} The District Court, upon petitioner's application granted the necessary certificate of probable cause. 28 U.S.C. § 2253.

Questions Presented

1. Where the State Court judge, having been witness to deliberate calculated conduct inimical to the conduct of the trial, is there proper cause to exclude the defendant from the Courtroom?

2. Does the record support the conclusion reached by the District Court and the New York Court of Appeals, that the defendant was excluded because of his outbursts and not as an accommodation to a timorous witness?

3. Were the conditions under which the defendant excluded constitutionally deficient?

4. Was it error not to discontinue the trial on the basis of an incredible assertion of incapacity belied by defendant's conduct?

^{*} Numbers in parentheses preceded by the letter "A" refer to pages of the joint appendix.

Statement of the Case

Prior Proceedings

On June 4, 1971, petitioner was indicted by the Nassau County Grand Jury as part of an 80-count, multi-defendant indictment. He was charged by the Grand Jury with sodomy in the first degree, two counts of rape in the first degree and incest.* (Ind. Counts 22-25, Aff. in Opp. at 3). On November 22, 1971, trial was begun in the County Court for Nassau County before Judge (now Justice) Frank X. Altimari and a jury (T-1).* At the conclusion of the testimony, summations and the charge, the jury, after deliberating for four hours, found petitioner guilty (T-612). On January 4, 1972, petitioner was sentenced by the Court (Altimari, J.) to a term of 8 1/3 to 25 years on each of the counts except the sodomy count (S. 5-8).*** An appeal

* New York's Penal Law classifies rape in the first degree as a class B felony and defines the crime as having sexual intercourse with a female by forcible compulsion, or who is incapable by consent because she is physically helpless or, who is less than eleven years of age. Penal L. § 130.35. Sodomy in the first degree is also a class B felony and is similarly defined except it posits "deviate sexual intercourse" in lieu of "sexual intercourse". Penal L. § 130.50. Incest is a class E felony defined as engaging in sexual intercourse with a person known to be a descendent.

** Numbers in parentheses preceded by the letter "T" refer to the page of petitioner's state court trial transcript, an Exhibit to respondent's papers below.

*** Numbers in parentheses preceded by the letter "S" refer to the transcript of the sentencing minutes in State Court.

was taken to the Appellate Division, Second Department, which, on November 27, 1972, affirmed. People v. Byrnes, 40 A D 2d 941 (1972). Upon appeal to the New York Court of Appeals, the conviction was also affirmed. People v. Byrnes, 33 N Y 2d 343 (1974).

Following a dismissal of a federal habeas corpus petition, petitioner brought a coram nobis application in County Court. See CPL § 440.10. The application was denied and leave to appeal to the Appellate Division was similarly denied.

After exhausting his direct appeals through the state court system, petitioner brought his first application for habeas corpus relief. On May 3, 1974, the United States District Court for the Eastern District of New York (Weinstein, D.J.) dismissed the petition on two grounds, as to the issue here presented related to his exclusion from the courtroom, the petition was dismissed for failure to exhaust his remedies; as to a second issue relating to denial of the right to cross-examine on the issue of a minor witness's ability to comprehend the oath the court dismissed on the merits. A petition for a certificate of probable cause was denied by both the District Court and this Court (Aff. in Opp., pp. 2-3).

After going back to the state courts to exhaust on the unexhausted issue, petitioner filed the petition here for review, raising the issue of the propriety of his exclusion from the courtroom and, in addition, raising the claim that the state trial court should have held a hearing on his competency to stand trial. In a "so ordered" opinion dated June 26, 1975, the District Court (Weinstein, D.J.) dismissed the petition holding (A-2):

"It is apparent that the petitioner created constant disturbances in the courtroom and after repeated warnings the trial judge was fully justified in excluding him from the courtroom."

It is from this decision that petitioner now appeals.

The State Court Trial

In order to fully understand the issues in the case at bar, it is necessary to recount, at some lengths, petitioner's State Court trial.

On November 22, 1971, trial was begun in the County Court for Nassau County before Judge (now justice) Frank X. Altimari and a jury (1). The selection of the jury consumed two trial days, and on November 29, 1971, the trial proper

commenced (T. 184-185). The prosecution made its opening to the jury at the conclusion of which, defendant having waived his opening, the first witness was called (T. 185-198).

The first witness was Philip M. Aldridge, a postal inspector for the U.S. Postal Service, whose duties include the investigation of violations of laws and regulations involving use of the mails (T. 199). After objection by defendants' counsel was sustained by the Court, the witness was excused (T. 199-216).

The next witness was a Nassau County Police Officer, Jaspeth Hounsell (T. 216). Mr. Hounsell testified that he is a detective-photographer assigned to the Identification Bureau; that he had been a police officer for twenty years and with the Identification Bureau for thirteen years (T. 217). He testified to his training and experience in photographic sciences, and evaluating color negatives (T. 218-219). He thereafter testified that certain negatives had not been tampered with, or altered in any fashion and that certain prints made from these negatives had similarly not been tampered, altered or superimposed and were accurate prints of the negatives (T. 219-253).

During the course of Mr. Hounsell's testimony the prosecution attempted to introduce the photographs over defense counsel's objection that an insufficient foundation had been laid. The Court sustained the objections (Id.). In the course of the colloquy between the Court and the prosecutor, the following interchange took place (T. 254-255):

"THE COURT: Is this a pornography trial?

MR. BERKOFF: No, sir, but the acts in the picture are the basis of the trial. They show acts of intercourse between the defendant and his daughter--

THE DEFENDANT: That's a God Damn lie because I never did it. I never did it to my daughter.

MR. VAN NORMAN [defense counsel]: Sit down.

THE DEFENDANT: What the hell is he saying I did it to my daughter for. I never did it.

THE COURT: Mr. Byrnes, listen to me carefully.

THE DEFENDANT: I'm sorry, your Honor.

THE COURT: Mr. Byrnes, listen to me. Mr. Byrnes, I have tried to preside here very fairly. Another outburst like that and you will hear from me. Do I have your assurance we will have no further outbursts.

THE DEFENDANT: I'm sorry, your Honor. Yes, sir.

THE COURT: Now, we are fortunate to the extent the jury was not present when that happened. Now, I understand what must be going on in your mind seated there. And it must be difficult for you. That can't and will not excuse behavior as just indicated. Counsel?

MR. VAN NORMAN: Your Honor, I apologize on behalf of my client for the outburst and will make every effort to make sure it does not happen again."

This witness was not cross-examined.

The next witness was a Nassau Count detective, Conrad Sigwart, assigned to the vice squad (T. 264). He testified that on March 17, he obtained the negatives at the home of one Eugene Abrams in Bellmore and took them from a basement laboratory there. Thereafter counsel stipulated to the remainder of the evidence to be offered by this witness. As presented to the jury, the stipulation was (T. 270):

"[I]f this particular witness were to testify that he took the negatives presently in his possession before the Court, I believe it is People's Exhibit 2 and he made exact copies of these negatives, pictures that are depicted for identification at the present time, and that he in no way, manner, shape or form altered these pictures or in any way changed this particular view that can be seen through the negative which can also be seen through the picture itself."

This stipulation also applied to the second stip of negatives and prints made therefrom (T. 273). The defense, again, did not cross-examine (T. 274).

The next witness was the complainant's mother and petitioner's wife, Marie Byrnes (T. 276-277). She testified that petitioner is the father of Tamara Byrnes and that Tamara Byrnes was born July 21, 1960 (T. 277-278). Over counsel's objection, based on a claim of marital privilege, the witness was permitted to identify the people contained in the numerous photographs as her husband and daughter. Although the Court allowed the photographs to be admitted in evidence, the jury was not permitted to see them until the complaining witness testified. As a result, the witness was excused and Tamara Byrnes, the complainant-victim, was called (T. 320).

Before her testimony was begun, there was an application made on her behalf by her law guardian, however before the application was heard, Mrs. Byrnes was permitted to conclude her testimony. Again, this witness was not cross-examined (T. 322-342).

At the conclusion of Mrs. Byrnes' testimony, Tammy Byrnes' law guardian asked that the Court not compel the child to testify as "[t]he prevailing opinion of the doctors

involved is that should the child be compelled to testify against her will, she will suffer irreparable trauma." (T. 344).

After hearing counsel's argument, the Court, in the presence of counsel but, pursuant to counsel's agreement, in the absence of the defendant, interviewed Tammy. The witness was first questioned as to the meaning of the oath. She indicated that she understood what the oath was; that she knew the difference between the truth and something that was not the truth and that an oath calls upon God to witness the truth of what is said (T. 358-359; A-29-30). The following colloquy took place (T. 361; A-361):

"THE COURT: Sweetheart, do you think if I ask you to testify and if I do, you know, I will clear out the Courtroom, you know that?

WITNESS TAMARA BYRNES: (Nods head yes)

THE COURT: So it will just be yourself, it will be me, it will be your dad's lawyer, and it will be your daddy, and I am sure this young lady here, Miss Barbara Hahn, who sits next to you, and do you think you are big enough to handle it?

WITNESS TAMARA BYRNES: (Nods head yes)."

The Court then extended the colloquy to assure the child that she would not be injured and that the court would not let anyone say or do anything to hurt her. The Court also inquired (T. 364; A-35):

"Do you think if you see him [the defendant] in the Courtroom, tomorrow, say, if it happens, that it will upset you to such an extent that you won't remember or do you think you can handle it?"

To which the witness replied (Id.):

"I think I could handle it."

At the conclusion of the colloquy the Court indicated that it was inclined to let the witness testify and that the witness appeared normal and responsive for an eleven-year-old. The Court further indicated that it would hear any evidence that the child's law guardian and the prosecution wished to offer on the issue.

As Court opened petitioner's counsel made an application for a reexamination of petitioner as to his ability to stand trial on the ground that he had taken, according to counsel, 90 grams of various barbiturates and was not lucid (T. 376; A-47). However, before the Court could rule, petitioner

asked if he could speak. Upon being permitted to, he said
(T. 377; A-48):

"It is not ninety grams, Jim. You know, I took twelve thousand grams. Now, by me sitting here it is not going to do anything unless Jimmy, you know, wants me out of here. I tried to commit suicide. Just so my kid won't come up to the stand and go through this ordeal. That's all. I just want her left alone. You know, like if I could see her I think she would be all right. I saw something in the report as to how she was acting. But, you know, like I don't care what you want, your Honor, just don't put her up on the stand. I will plead guilty no matter what you want. Just leave her alone. Leave all my family alone. I will plead guilty to it."

The Court, basing its opinion on petitioner's responsive statement, denied the reexamination request, but said that it would adjourn the matter, sensing that petitioner was upset (T. 379-80; A-50-51). As a result the matter was adjourned to that afternoon (T. 383; A-54).

It was during the hearing that afternoon that petitioner issued the first of his outbursts. In the course of the testimony of a Dr. Lanig, the following interchange took place (T. 390-392; A-61-63):

"THE DEFENDANT: She's been through enough bullshit with you fucking clowns

that I can't imagine. She's had it up to here, (indicating).

THE COURT: Mr. Byrnes, please--

THE DEFENDANT: With you clowns and you clowns and you clown and you clowns--

THE COURT: Mr. Byrnes, please--

THE DEFENDANT: And especially this clown, (indicating).

THE COURT: Mr. Byrnes, now you will either remain [sic] silent or I will have to take some appropriate steps. Do I have your assurance you will remain silent?

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Byrnes, I will ask you now to remain silent. This is the second time.

THE DEFENDANT: May I say something, your Honor?

THE COURT: I think you ought to-- whenever you would like to say something, please tell it to your lawyer--

MR. VAN NORMAN: Your Honor, I would appreciate it if the Court would disregard anything said by the defendant because of the problem that he--may at this time be making statements which are against his interest. And I respectfully request that--

THE COURT: I am aware of that but I will say this -- Mr. Byrnes, listen to me carefully:

It was your desire to be present at this hearing. It is my purpose to listen carefully as I can to make what I believe

to be a proper judgment. You do not aid or assist your own cause by outbursts. You can't help either yourself or anyone else by insisting upon an outburst of this nature. I might indicate to you that this Court has the power to continue this hearing in your absence. I do not wish to exercise that power. I implore you to speak only through your attorney who has your best interests at heart.

Now, please have a seat.

THE DEFENDANT: Your Honor may I say something please?

THE COURT: Please say it through your lawyer. You can tell him and he will tell me. Continue."

The direct examination, after this outburst, continued and concluded without further incident (T. 392-398; A-63-69), the Doctor stating that in his opinion, to force Tammy to testify would be psychologically damaging. The Court then ruled, on the basis of the evidence, that Tammy could testify.

The Court room was then cleared and the witness and the jury was "brought down". At this time the following took place (T. 415-419; A-86-90):

"THE COURT: Bring the jury down. Mr. Byrnes, please sit down.

THE DEFENDANT: Your Honor, I have to leave.

THE COURT: No. Mr. Byrnes, Please be seated.

THE DEFENDANT: Your Honor, I took twelve thousand miligrams of drugs.

THE COURT: MR. Byrnes, Please be seated.

THE DEFENDANT: Fuck.

THE COURT: Easy, easy.

THE DEFENDANT: You big fucking bum.

THE COURT: Easy, easy.

(Defendant subdued by Sheriffs while the Judge leaves the Courtroom).

(Recess)

(After Recess)

THE COURT: All right. Let him up. Mr. Byrnes, listen to me carefully.

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Byrnes, now, I know this is a difficult moment for you. I have tried to preside here fairly. I think you know that. But this trial must continue. Now, if it must continue in your absence, I can do that. I do not wish to have this jury see you act in this fashion because it will do you no good. You have neither won nor lost this case. You are not giving your lawyer an opportunity, do you understand me?

THE DEFENDANT: Yes, your Honor.

THE COURT: You are not giving your lawyer the right to do what he can for you. Do I have your assurance you are going to be all right?

THE DEFENDANT: Yes, your Honor.

THE COURT: I have your promise?

THE DEFENDANT: I was, you know--

THE COURT: I know you are upset and I don't blame you.

THE DEFENDANT: It was just like, you know, when I was a kid I went through the same junk.

THE COURT: All right. Now listen, Mr. Byrnes, if I ask them to take those cuffs off, will you promise to sit there quietly?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Take the cuffs off.

MR. VAN NORMAN: Your Honor, may we have first aid for him prior to the jury coming in so his head can be cleaned up?

THE COURT: All right. Take him in the back. Mr. Byrnes, I have your promise?

THE DEFENDANT: Yes.

THE COURT: Now, please, it means a lot to me. Now, can you take him somewhere and wash him up and comb his hair?

THE SHERIFF: Right.

THE COURT: All right. Now, Mr. Byrnes, look at me right in the eye and listen to me carefully now.

THE DEFENDANT: Yes, your Honor.

THE COURT: You are not giving your lawyer the opportunity to represent you. This is not going to help you. I know you are upset. I know--at least I think

I know what is going on in your mind.
I can appreciate it. You see now that
I am not angry with you nor am I
threatening in any manner, shape or form.
I am just trying to reason with you.
Give your lawyer the opportunity that
every defendant should have.

THE DEFENDANT: Your Honor, screw my
lawyer, screw everybody, please. Give me
the electric chair, please. The chair.
That's all I have asked for ever since I
got arrested.

THE COURT: Mr. Byrnes, please, go in
and wash up now. You have given me your
word. If you violate that then from here
on in, you are going to be treated. All
right. He is going to be all right.
Take him back.

THE SHERIFF: Yes, your Honor.

(Defendant leaves the Courtroom.)

THE COURT: We have got to do it. It
is as simple as that. Whether you do
it tonight or tomorrow or the day after,
you are going to get this and we just have
to proceed. All right.

A recess was then called (T. 419; A-90). As the witness entered
the Courtroom petitioner lunged at her, calling "Tammy, Tammy"
and had to be subdued by the Sheriff. The witness and the
jury then left the Courtroom, and the Court then immediately
spoke with the jury, stating (T. 420-1; A-91-92):

"Madam and gentlemen of the jury, I
know it is difficult to dispell in your
mind what you have just seen. I know also

that you are adult enough to understand the problem that is now before us. It was for that reason that we have been delaying this matter and exhausting your patience, actually. But, please bear with us. It is a delicate, delicate situation which I am sure each of you understand. I would ask you to dispell from your mind what you have just observed. It is no part of this trial. We will call you in a few minutes."

Then, after a brief recess, the Court, in the absence of the jury, placed the following on the record (T. 421-424; A-92-95):

"Gentlemen, let the record be clear that when the witness Tammy Byrnes entered the Courtroom and was seated, that the defendant for the third or fourth time gave forth with an outburst because together with the outburst was a jumping on the counsel table and almost an assaultive burst towards the witness in such an extent that it took four or five gentlemen from the Sheriff's office to subdue the defendant at which point the witness was immediately excused, the jurors were immediately excused. And so, to talk to the jurors immediately, before they could even dwell upon or think about the outburst, I went into the hallway and spoke to them.

* * *

"Let the record also indicate that I have on three or four occasions, after outbursts on the part of this defendant, attempted to reason with Mr. Byrnes. The record will bear witness to the fact that I have indicated to him that outbursts of

that nature can't in any manner, shape or form aid and assist him as the defendant and puts his attorney at a great disadvantage. In my opinion, he is well and ably represented by Mr. Van Norman.

THE DEFENDANT: Your Honor, may I say something?

THE COURT: I will hear you in a moment, Mr. Byrnes. From my observations, the Court finds that as a matter of fact, that this defendant, who was comparatively calm throughout the proceedings, when confronted with the witness, his daughter, Tammy Byrnes, by his actions and his words, attempted to intimidate her, feeling that her testimony might be so detrimental to him that he would be in grave trouble and difficulty as this trial progressed.

I had received a promise from Mr. Byrnes moments before the incident that he would behave himself. With that in mind, I directed the Sheriffs to remove the handcuffs which were previously placed on his hands because this Court honestly and genuinely feels that the ends of justice are best served when a defendant is not shackled. I do not mouth the expression meaninglessly that a man is presumed innocent until proven guilty by the People beyond a reasonable doubt. I live by that rule. I preside in this Courtroom by that rule. And anything and everything that is done by a defendant that is disruptive in nature, which stands between a fair trial and a trial which gives the impression or atmosphere which is unbecoming to all of us, I am against. I have options here. I can bind and shackle this defendant. I can make it impossible for him to speak. This troubles me. I do not wish to conduct a trial under these circumstances. But I

think the outbursts are deliberate, they are intended to intimidate this young, very young witness. And if I were to in any manner, shape or form, condone the behavior of this defendant, I would be doing exactly what he wants me to do.

In such a case, I neither afford a fair trial to the People nor to the defendant. I will try to give a fair trial to both the defendant and the People.

It is extremely distasteful for me to continue in this trial while the defendant is bound and gagged. I am, therefore, going to recess for the balance of this day and indicate to you clearly that it is my thought that the defendant will not be in the Courtroom when the witness Tammy Byrnes testifies. This not by order, not by my pleasure, but by the acts and the deeds of this defendant who has taken what I believe to be an orderly trial and disrupted it deliberately and intentionally."

Argument then followed on the Court's decision to exclude petitioner from the Courtroom and on petitioner's motion for a mistrial. The Court, in the course of ruling on petitioner's motion was again interrupted by petitioner's vituperative statements, and the following interchange was had (T. 428-430; A-99-101):

"THE DEFENDANT: Bullshit. She's the one that's trying to take the kids away from my wife too. She's the one that's got the charges in Queens. Hah. She's trying to take the kids away from my wife.

THE COURT: Mr. Byrnes, I have said it before and I am going to say it again--

THE DEFENDANT: Well why don't you have these guys shoot me then?

THE COURT: Mr. Byrnes, I am not impressed.

THE DEFENDANT: I am not even going to listen anymore. You said it was pre-fabricated that my daughter come in, right?

THE COURT: All right. Let him go.

THE DEFENDANT: Get your fucking hands off me.

THE COURT: Mr. Byrnes, if you will be patient with me, I will be patient with you. In any event, your applications are denied.

With regard to the further psychiatric examination, everything that I have observed, everything that this defendant has uttered, appears to be a deliberate, almost premeditated move on his part to disrupt these proceedings. Your application is denied. If you care to submit to me authority which would help me make a judgment with regard to whether or not we will proceed tomorrow with this defendant shackled and bound or in his absence, I would be happy to read and be guided by that authority.

MR. VAN NORMAN: Well, we will do that, your Honor.

THE COURT: I might add that it is my opinion that not only will he disrupt the trial, but he will, in fact, as he has in fact intimidated the witness. Gentlemen, this Court stands recessed until tomorrow morning."

The Court then, after carefully reemphasizing the warning to the jury not to consider petitioner's outbursts, adjourned for the day (T. 432; A-102).

In chambers, following the adjournment, the Court, again had a discussion with the witness, in an attempt to counteract in so much as was possible, the trauma of the day (432-438).

The next morning, petitioner, through counsel, for the third time made the usual guarantees to the Court. However, the Court felt that the guarantees were insufficient being that the "outbursts are not directed at the Court but at a particular witness who happens to be his daughter". Petitioner's counsel conceded that. The Court also noted:

"And this Court is convinced that it is a deliberate and intentional act to intimidate this young girl of tender age."

-- the efficacy of which petitioner's counsel also conceded (T. 443; A-114).

After a short recess, during which the witness indicated an unwillingness to testify if her father was present,

the Court issued its opinion, reading from a prepared text
(T. 448-455; A-119-124):

"At the opening of Court on November 30th, 1971, this Court was informed by the Sheriff's office that the defendant was, and I quote, 'acting up', unquote.

* * *

"I might say that I lost most of the sleep last night concerning myself with this problem, anticipating your very remarks because what you say is in fact, in most situations proper, that there is an absolute Constitutional guarantee of confrontation. This Court is not oblivious to that.

I was further informed that he had been treated at Meadowbrook Hospital for a slight or at least, a self-imposed laceration the evening before. The defendant claimed to have taken some ninety pills the evening of November 29th, 1971, after the Court day. This Court immediately informed counsel for the defendant and an opportunity was afforded counsel to privately chat with his client. A hearing was to have taken place at nine o'clock so as to determine whether or not the defendant's eleven year old daughter would in fact, testify at all. The attorney for the defendant petitioned this Court to recess the hearing and the trial until two o'clock so that the defendant might become more composed. This Court granted that application even though it was convinced that the defendant's actions and behavior were, in fact, feigned and calculated to disrupt and interrupt the orderly conduct of this trial.

At two o'clock, this Court convened in the presence of the defendant and after a

hearing, decided that the eleven year old laughter of the defendant would, in fact, testify. On that very same day and prior to the calling of the next witness, the defendant rose from his seat, moved about in a small area and stated substantially that he did not wish to be in the Courtroom and that he was then leaving. The Sheriff's office and the deputies assigned to this Courtroom, restrained the defendant and he sat down after having been admonished by this Court. The defendant then violently rose, swung both arms and had to be forcibly restrained once again. At all times uttering remarks that I do not wish to repeat but the record will bear witness to them. Handcuffs were then placed on the defendant. All of which took place in the absence of the jury. The Court then attempted to reason once again with the defendant. And after some dialogue, which the record will bear out, The defendant promised to behave himself, as he is now promising to behave himself. At which point I directed the Sheriffs to remove the handcuffs. They did so, I understand, reluctantly, just from the manner in which they did so. That prior to the removal of the handcuffs this Court warned the defendant that if his present behavior continued, that the trial would proceed in his absence.

This Court then had another recess. The counsel for the defendant was again afforded the opportunity to speak to his client in a separate room. The defendant then returned to the Courtroom. The jury was then called and seated. The People then called the defendant's daughter, Tammy Byrnes, to the witness stand. She came into the Courtroom and just as she was seated, the defendant jumped from his seat, leaped on the counsel table and lunged in the direction of the witness

chair in an assaultive manner and nature, calling his daughter's name in a very loud manner and uttering other remarks. The jury was then immediately excused and admonished by this Court. And once again, this Court attempted to calm the defendant and reason with him.

Unlike the first occasion, the defendant would not hear this Court, stating words in substance, 'I am not going to listen'. This Court is of the view that the defendant's acts were deliberate and were intended to intimidate the young witness. This Court is of the opinion that the defendant's acts were calculated to accomplish that end, to wit, that his daughter not testify. This Court is aware of the relationship between the proposed witness and this defendant. The record speaks clearly that the young witness, Tammy Byrnes, did in fact take the witness stand, that this Court afforded this defendant the right of confrontation, and at that time the defendant did confront his daughter. And finds as a fact that this witness of tender age, after having observed the spectacle as described above, to wit, the father leaping upon the table and being forcibly restrained, that she was in fact intimidated.

It is worthy to note that throughout the selection of the jury and during the first day of the trial, this defendant behaved as any other defendant would have behaved charged with a most serious crime or crimes. It was not until the question of whether or not his daughter would or could testify came to light, that his behavior became disruptive and contumacious.

The Supreme Court of the United States, stated in Illinois versus Allen and I cite 397 U.S. 337 in 19 and 70, that there are three Constitutional permissible ways for

a trial Judge to handle an obstreperous defendant, one of those methods is to remove him from the Courtroom and to proceed with the trial in his absence. Although it is no pleasure for this Court to direct that a defendant be removed from the Courtroom, this defendant has given me no other choice or alternative.

Within minutes after promising no further disruptive behavior, he engaged in disruptive and intentional conduct that prevented the continuation of the trial. Defense counsel had been informed that the trial would continue without the defendant's presence if there were further outbursts.

This Court, in speaking with the defendant after the first outburst, in effect told the defendant the consequences of his behavior.

Therefore, the defendant's continuous, deliberate and intentional disruptive conduct which was calculated to intimidate the young witness, this Court directs that the defendant be removed from the Courtroom during the testimony of Tammy Byrnes.

He may reclaim his right to be present when he is willing to conduct himself consistently with the decorum and respect which is inherent in a judicial proceeding. And upon a determination that he is not likely to engage in disruptive conduct.

At any time during the examination of any witness and in particular, the testimony of young Tammy Byrnes, defense Counsel may request a recess to communicate with the defendant who will be within this very Courthouse and very near to this Courtroom or defense counsel may instruct his assistant to carry forth any messages to or from the defendant.

I cite to you Part 702, Section 702 (1) and 702.3, Special Rules of the Second Judicial Department Appellate Division, concerning the conduct of criminal trials threatened by disruptive conduct. And I further cite to you, Criminal Procedure Law 340.50.

I now direct the Sheriffs to remove this defendant out of this Courtroom and to a nearby room where he may be called upon by his attorney at any time."

The Court then particularly noted (T. 457; A-128) that he had anticipated counsel's argument and that he was "convinced" that the witness was intimidated and that petitioner was not disruptive as to each witness, but just "one witness he was directing himself against" (Id.).

As the witness took the stand, petitioner's counsel in yet another attempt to delay the testimony asked if the Court was going to qualify the witness, to which the Court stated that the witness was already qualified (T. 459-60; A-130-131). Thereafter counsel requested permission to cross-examine on the qualifications (T. 460; A-131). The Court declined stated (Id.):

"No, I don't think that you can cross examine on qualifications of a witness under the age of twelve or whatever the age is. I think the Court must first be satisfied. I have had,

as you know, in your presence, numerous conversations. I have talked to her about what the significance of an oath would be, that she would be called upon to take an oath. She in my opinion, is well and able to do so. You have another exception."

"Tammy" then testified to being eleven years old and the child of Marie and Thomas Byrnes (T. 463; A-134). She also stated that she knew Eugene Abrams, had gone to his house first in 1969, when she was nine years old (T. 463-4; A-134-135). Then, in the plaintive terms only a child can muster, Tammy described how she watched movies of people with no clothes on (T. 465; A-136); how Abrams took pictures of her with no clothes on (T. 466; A-137); and paid petitioner for it.

A few months later, petitioner and his daughter again went to the Abrams house (T. 467; A-138). After another playing session, Abrams took pictures of petitioner and Tammy. Neither had any clothes on (T. 465; A-136). Tammy testified that she and her father were in bed together, "sticking" his "pee-pee" in her "wee-wee" and also put in her mouth (T. 472-3; A-143-144). A third visit produced the same result as the second (T. 474-5; A-145-146). The witness was also asked to identify the two shirts, which she did, and the people in some of the photographs, which she also did.

At the completion of her testimony petitioner was returned to the Courtroom, where he continued his outbursts of the previous day, using various deletable expletives, to the next witness. After two rather inconsequential witnesses, the prosecution rested. Petitioner rested without calling any witnesses and then summations were had. Petitioner did not sum up. The case went to the jury at 10:30 a.m. the next day, and at 2:20 p.m. it delivered its guilty verdict (T. 612).

In sum, the record in this case shows that petitioner, aware of his daughter's tender years, and of his relationship to her, engaged in heinous, and depraved acts. It is clear beyond cavil that petitioner, for the basest of all possible motives, raped and sodomized his nine-year-old daughter and that while he was engaged in these practices had an individual there taking photographs, prints of which were before the trial court, and that presumably, he knew these photographs were taken for sale to individuals who for unfathomable reasons, would purchase them.

POINT I

THE STATE COURT, HAVING BEEN
WITNESS TO CONDUCT INIMICAL TO
THE ORDERLY PROCESSES OF
JUSTICE, HAD PROPER CAUSE TO
REMOVE PETITIONER FROM THE
COURTROOM, DESPITE HIS ATTORNEY'S
ASSURANCE HE WOULD BEHAVE.

Petitioner's first assertion is not that he did not engage in conduct inimical to the orderly processes of justice -- for it certainly was; nor does petitioner claim that he was not apprised that the activities leading up to his expulsion from the courtroom were objectionable; nor does petitioner assert that he was not warned on numerous occasions that continuation of outbursts would lead to his expulsion. Instead, he claims that the Court, despite prior promises to behave shortly followed by renewed outbursts of such a vile nature as to not be worthy of condonation on the street, to say nothing of a courtroom, erred in excluding him from the courtroom, after his attorney had represented to the Court that he promised to behave.

Before dealing specifically with this claim, it is necessary to lay bare certain principles underlying the power of a court to control a defendant's conduct. We must start with the premise that our courts, must in order to proceed with their business, be places of order, decorum and dignity consonant with the solemn task that our constitution places upon them.

In Illinois v. Allen, 397 U.S. 337, 346-347 (1970), the

Court wrote:

"It is not pleasant to hold that the respondent Allen was properly banished from the court for a part of his own trial. But our courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. Nor can the accused be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him. It would degrade our country and our judicial system to permit our courts to be bullied, insulted and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes. As guardians of the public welfare, our state and federal judicial systems strive to administer equal justice to the rich and the poor, the good and the bad, the native and foreign born of every race, nationality and religion. Being manned by humans, the courts are not perfect and are citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case."

In his separate opinion, Mr. Justice Douglas wrote,
397 U.S. at 356:

"The Constitution was not designed as an instrument for that form of rough and tumble contest. The social compact has room for tolerance, patience, and restraint, but not sabotage and violence. Trials involving that spectacle strike at the very heart of constitutional government."

A short time subsequently, the Chief Justice, addressing the American Law Institute pointed to the necessity of civility in the conduct of trials. While addressing himself principally to the then in vogue tactics of some attorneys and some members of the judiciary, he pointed out (42 FRD 211, 214):

"I suggest that this is relevant to law teachers because you have the first and best chance to inculcate in young students of the law the realization that in a very hard sense the hackneyed phrase 'Order in the Court' articulates something very basic to the mechanisms of justice. Someone must teach that good manners, disciplined behavior and civility - by whatever name - are the lubricants that prevent lawsuits from turning into combat."

The Chief Justice expanded on this theme, stating (Id. at 216):

"The essence of the matter is that if the rights of individuals or society as a whole are to be protected, it can be accomplished only in a judicial environment of calm, orderly civility. This is true, as we know, whether the action be a simple private claim for debt or damages, a class action for a large group or an effort to control pollution of natural resources. It should hardly be necessary to say that such an atmosphere is especially important in a criminal case."

Thus, it can be seen that to condone a defendant's actions, where they are inimical to the orderly presentation

of evidence or disrupt court proceedings, reducing them to calculated brawls, strikes at the very heart of the judicial system. Involved in such actions, are the safety and security of the judge and jury, counsel, court personnel and witnesses. More important yet is the government's prerogative to proceed to trial and to have the evidence of those involved.*

Judge Winters, writing for the Court in United States v. Samuel, 431 F. 2d 610, 615 (4th Cir. 1970), implied that wholly aside from the orderly processes of justice, consideration of the maintenance of safety of those who participate in a criminal trial, may, in appropriate cases, warrant proceeding in a defendant's absence (whether voluntary or not). Similar considerations were considered controlling by the Court in United States v. Tortora, 464 F. 2d 1202 (2d Cir. 1972). The Court there held, relying, in part, on United States v. Bentvena, 319 F. 2d 916 (2d Cir.), cert. denied 375 U.S. 940 (1963), that danger to witness threatened by criminal defendant and exacerbating that danger by multiple trials constitutes a sound reason for going forward in defendant's absence. Id at 1210.

*Absent some specific statutory or constitutional privilege, the Court's right to compel those having evidence pertinent to pending case to attend upon it and give such testimony is beyond cavil. The interest is so compelling that even in a civil case it overcomes first amendment rights and rights to travel. Branzburg v. Hayes, 408 U.S. 910 (1972; Garland v. Torre 259 F. 2d 545 (2d Cir.) cert. den. 358 U.S. 910 (1958); see contra Winters v. Travia, 495 F. 2d 839, 841 n. 3 (2d Cir. 1974). Nor does the Constitution exempt any person with the jurisdiction of the Court from attendance upon it and the giving of evidence. United States v. Nixon, 418 U.S. 683 (1974) (subpoena addressed to the President of the United States in a criminal case); Gravel v. United States, 408 U.S. 606 (1972) (Congressman subject to subpoena in civil cases).

See United States v. Smith, 436 F. 2d 787 (5th Cir. 1971).

In controlling recalcitrant, disruptive or violent criminal defendants, summary action is appropriate. Where summary action is appropriate to maintain order in the courtroom and the integrity of the trial, no hearing need be held, nor any jury be impaneled.* See Codispote v. Pennsylvania, 418 U.S. 506, 514(1974). The summary action may take any one of three forms. It may consist of immediately citing the transgressor for contempt, it may consist of binding and shackling him, or banishing him from the courtroom. Illinois v. Allen, supra. 397 U.S. at 344-346. None of these methods is a panacea, each having advantages and disadvantages. Mr. Justice Black said of shackling and gagging in Illinois v. Allen, supra 397 U.S. at 344:

"Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold."

*Such actions must, of necessity follow shortly upon the acts giving rise to the disruptions usually not later than the next court appearance. In United States v. Rollerson, 449 F. 2d 1000, 1004(D.C. Cir. 1971), the Court wrote:

"We think it is without significance in this case that the judge did not cite and sentence appellant for contempt immediately, but waited until the next occasion that appellant appeared before him in the underlying offense."

Codispote v. Pennsylvania, 418 U.S. 506(1974); Johnson v. Mississippi, 403 U.S. 212 (1971); and Mayberry v. Pennsylvania 400 U.S. 455(1971), are not to the contrary as those involve contempt proceedings to punish conduct after the action in which the conduct occurred had been completed. In those cases, as to maintain order in the ongoing proceeding is no longer pressing summary action is not appropriate.

Other courts ruling on the issue reach similar conclusions

United States v. Ives, 504 F. 2d 935, 945 n. 21 (9th Cir., 1973)
vac. sub nom. Ives v. United States, ___ U.S. ___, 44 L. Ed. 2d 97
(1975); Kennedy v. Cardwell, 487 F. 2d 101, 106 (6th Cir., 1973);
United States v. Esquer, 459 F. 2d 431, 433 n.5 (7th Cir. 1972).

On the issue of binding or shackling, the ABA standards on the Function of the Trial Judge tersely state (§ 6.8) (Approved July, 1971):

"Removal is preferable to gagging or shackling the disruptive defendant."

Holding a defendant in contempt while it may be efficacious in some circumstances, is fraught with difficulties. The court in Illinois v. Allen, supra, recognized three of them. First, where a defendant is attempting to prevent any trial, it would be quixotic to stop the underlying action, impanel another jury and try a contempt charge, where the defendant would again have an opportunity to engage in the conduct leading to contempt. Second, a defendant facing a long criminal sentence might well prefer a short contempt sentence if the criminal action is to be frustrated. Lastly, the court pointed out that while civil contempt is available, a defendant might opt for such a strategy "in hope that adverse witnesses might be unavailable after a lapse of time." Writing in Mayberry v. Pennsylvania, 400 U.S. 455, 467, Chief Justice stated:

"The contempt power however is of limited utility in dealing with an incorrigible, a cunning psychopath or an accused bent on frustrating the particular trial or undermining the processes of justice. For such as these, summary removal from the courtroom is the really effective remedy."*

Much of what has already been said goes far in answering petitioner's claims. However, the specific claim of refusal to return upon his promise to behave must be dealt with. In considering this claim, two factors must be considered: the reason for the outbursts and the existence of any prior promises. Petitioner admitted that his purpose was to prevent his daughter from testifying (T.377). His outbursts were also found by the court to be deliberate and although he made several promises to the court to behave, these promises were short-lived (T.433). In this light, the court acted well within its discretion, in determining that petitioner's promises to his counsel were less than a model of sincerity, especially in light of his prior outbursts following

* That such is the case is further lent credence by the tortured litigative history found in such cases as United States v. Bentvena, supra and United States v. Ives, supra. See United States v. Seale, 461 F. 2d 345 (7th Cir. 1972).

promises and specific warnings to behave.* A similar error was asserted in United States v. Munn, 507 F. 2d 563 (10 Cir. 1974). There, as in the instant case a criminal defendant was ejected from the courtroom for obstreperous behavior. There, as in the instant case, the defendant promised to behave. There, as in the case at bar, the court continued to exclude him. Finally, there as here, the petitioner claimed, seizing on the language of Mr. Justice Black, that he was denied the right of confrontation. The court summarily rejected the claim, stating (507 F.2d at 568):

"We do not deem the foregoing language, however, to be an absolute mandate dictating the return of every defendant who has been removed from the courtroom simply on his verbal promise to reform. Prior conduct may indicate such a promise is of little value. Certainly some discretion is still left with the trial court to pass upon the sincerity of a defendant's recantation."

* Petitioner seizes on Mr. Justice Black's statement in Illinois v. Allen, supra, 397 U.S. at 348:

"Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings."

The court having found that defendant had embarked upon a course of conduct, calculated to exacerbate what defense counsel has already urged was a traumatic experience, all to attain an impermissible goal -- to prevent the witness from testifying, and already having seen that petitioner's promises to reform were not worth much, the court was correct and acted well within its discretion in not taking counsel's representation at face value. In United States v. Samuel, supra, 431 F. 2d at 615, the court held:

"It is ...[the trial judge] who is best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, escape of the accused and the prevention of other crimes."

It is not for the habeas court, almost four years after the incident complained of, to substitute its judgment for that of the trial judge who painfully, after observing petitioner's demeanor, reached a conclusion as to his sincerity and spread that conclusion on the record. See LaVallee v. Delle Rose, 410 U.S. 690 (1973); U.S. ex rel. Phipps v. Follette, 428 F.2d 912, 915 (2d Cir. 1970), cert. den. 400 U.S. 908 (1971);*

* In other contexts where much depends on the demeanor of those present, not easily transcribable by a court reporter, "great weight must be given to the determination of the judge who saw and heard the witness."

Clemons v. United States, 408 F.2d 1230, 1241-2, 1246 (D.C. Cir. 1968) (en banc) cert. denied 394 U.S. 394 (1968). Thus, petitioner's first argument must be disposed of as unsupportable.*

POINT II

THE RECORD AMPLY SUPPORTS THE CONCLUSION THAT PETITIONER WAS EXCLUDED FOR IMPERMISSIBLE CONDUCT AND NOT BECAUSE OF A WITNESS'S DESIRE NOT TO CONFRONT HIM.

Much of what has been said in Point I, ante, disposes of petitioner's second related claim -- that the court excluded him, not for impermissible conduct, but because the witness would not testify if her father was in the courtroom. In so doing, petitioner focuses upon the following brief colloquy between the court and the witness (T. 445):

* That petitioner possessed an impermissible motive in acting the way he did deserves further comment. A reading of this record leads one to question why petitioner pleaded not guilty. The case against him was not "iron clad", it was devastating. So devastating that counsel urged nothing on his defense, cross-examined no witnesses, offered no witnesses and neither opened to the jury nor closed. While there is no basis for suggesting and respondent does not suggest any misconduct on counsel's part, the need for corroboration of the charges would furnish motivation on the part of the defendant to keep, by whatever means, his daughter from testifying. Penal Law § 130.15. See People v. Byrnes, supra, 33 N Y 2d at 348.

"THE COURT: ... Tammy, I am going to ask you a question. I am going to ask you to come into the courtroom. If your father is present, what is your pleasure? What do you want me to do?

"THE WITNESS TAMARA BYRNES: I am not going in.

"THE COURT: All right, gentlemen, that's it,"

This colloquy compares with the conversation two days before when a similar question was asked of the witness, to which she replied, "I think I can handle it." Thus, it is clear that the witness's reluctance was due solely to the unseemly and dissettling outbursts of which she was both the subject and the target. Nevertheless, the court had prior to this point already indicated what its decision was, having heard counsel on the issue. The decision was based on appropriate factors. The same contention was made in the New York Court of Appeals. People v. Byrnes, supra, 33 N Y 2d at 349. In answer, the unanimous court wrote (Id at 349):

"On the record before us, we find that the Trial Judge acted well within his discretion in excluding the defendant from the courtroom during the testimony of the complaining witness."

Thereafter, the court summarizes the activities of the petitioner leading to expulsion. Implicitly, the court rejects as a matter of fact, petitioner's assertions (Id):

"...that the exclusion was an accommodation to the witness and an impermissible punishment for his prior disruptive behavior..."

This finding, clearly supported by the record should not be disturbed by this Court on habeas corpus review. 28 U.S.C. § 2254(d); Townsend v. Sain, 372 U.S. 293, 314-315 (1963); LaVallee v. Delle Rose, supra, 410 U.S. 690, 694 (1973).

POINT III

THERE WAS NO ERROR IN OPTING TO EXCLUDE PETITIONER RATHER THAN SHACKLING AND GAGGING HIM; NOR WAS THE COURT OBLIGED TO PROVIDE HIM WITH INSTANT TELECOMMUNICATION WITH THE COURT.

Petitioner also urges that it was error to exclude him from the courtroom when shackling and gagging would have resolved the court's problem, and the fact of the court's discomfiture in having a trial proceed in that fashion was not an acceptable basis. Petitioner cites no authority for this unique argument and the cases cited supra demonstrated that shackling and gagging are, except in the most extraordinary cases not acceptable for precisely those reasons that the trial court articulated. See Illinois v. Allen, supra; United States v. Ives, supra; Kennedy v. Cardwell, supra; United States v. Esquer, supra; ABA Standards § 6¹/₈ (1971).

Lastly, petitioner suggests that the means used to keep him informed of the progress of the testimony was inadequate. He suggests that the court should have created, for his benefit, a loudspeaker-telephone system so that he could communicate with counsel. In so doing, he urges that the decision in United States v. Ives, supra, be controlling. The court there may have felt it was wise to install electronic equipment, but it was held that such procedure not constitutionally mandated. The ABA standards reject the use of such equipment, stating:

"It has been suggested that modern technology provides methods of dealing with disruptive defendants without removing them from the trial or without cutting them off from constant communication with their attorneys. Suggestions have ranged from the use of an isolation booth in the courtroom to the provision of video and audio links between the courtroom and the removed defendant. There remain serious doubts whether these measures would be effective to prevent disruption and distraction... In any event there is no obligation on the Court to provide extraordinary measures to protect the right of the defendant to be in the courtroom, if the defendant, after appropriate warnings, makes his presence inconsistent with orderly progress in trial progress."

The trial court, in excluding the defendant, followed the procedure approved by the court in Illinois v. Allen, supra,

-- allowing frequent recesses to allow consultation. A procedure defense counsel did not avail himself of. This should therefore be denied.

In conclusion, the record in this case demonstrated no error worthy of this Court's consideration. The court conducted what must certainly have been a distasteful trial with dignity and restraint, solicitous of the protections afforded a defendant by the Constitution. Only when provoked beyond any acceptable limit did the court act toward the petitioner, and then only when petitioner after being duly warned, continued his outbursts. When it finally did act, it acted carefully and thoughtfully and with restraint.

POINT IV

PETITIONER'S ASSERTION THAT THE TRIAL SHOULD HAVE NOT BEEN CONTINUED WHILE HE WAS ASSERTEDLY UNDER THE INFLUENCE OF DRUGS HAS NO CREDITABLE SUPPORT IN THE RECORD.

On the day the incidents leading to defendants exclusion from the courtroom occurred, petitioner's state court trial counsel asked for a continuance for a medical examination because petitioner took either 90 or 12,000 grams of barbiturates. The simple answer to this claim lies in its

patent incredibility coupled with petitioner's responsiveness to his surroundings. If petitioner had taken anything like the amount claimed, he would not have been yawning and screaming, but would have been asleep. In circumstances such as these, it has been held that an examination is unnecessary. In United States ex rel. Suggs v. LaVallee, 390 F. Supp. 383, 390 (S.D.N.Y. 1975):

"Suffice it to say, Pate v. Robinson [383 U.S. 375 (1966)] ... does not mandate a competency hearing regardless of the evidence and whether or not defendant requests one."

See also U.S. ex rel. Evans v. LaVallee, 446 F. 2d 782 (2d Cir. 1971); United States ex rel. Roth v. Zelker, 455 F. 2d 1105 (2d Cir.), cert. denied 408 U.S. 927 (1972); United States ex rel. Curtis v. Zelker, 466 F. 2d 1092 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973).

The recent case of Drope v. Missouri, ___ U.S. ___, 43 L. Ed. 2d 103 (1975) does not require a different result. There the court held that where there is a history of pronounced irrational behavior, evidence of which was uncontested, and coupled with an attempt at suicide, there is a reasonable doubt created concerning the defendant's competence. However, the court condoned the absence of a hearing where defendant's demeanor at trial was such as to obviate the need for such a hearing. See also Pate v. Robinson, 383 U.S. 375, 385-386 (1966). Moreover, as that entire trial day was consumed by proceedings surrounding petitioner's outbursts, and no testimony was taken, there was no error committed. Therefore, this claim should be disposed of against the petitioner.*

In sum, the language of Judge Weinstein disposing of petitioner's claims is persuasive (A-2):

* Indeed, it is submitted as there is no evidence nor any suggestion of evidence that petitioner, but for the apparent self-induced administration of drugs was not competent to stand trial. Nor is there any evidence that the self-induction of these barbiturates was other than a knowing and voluntary act on his part and not evidence of or the result of previously existing irrational behavior. Therefore, as petitioner cannot be heard to profit from his own wrongdoing, no error was committed.

"It is apparent that the petitioner created constant disturbances in the courtroom and that after repeated warnings the trial judge was fully justified in excluding him from the courtroom.... The record indicates that the County Court judge trying the case was quite protective of the petitioner. His rulings on evidence were very conservative and tended to give the petitioner more protection than he was entitled to in a constitutional sense."

CONCLUSION

THE ORDER APPEALED FROM SHOULD
IN ALL RESPECTS BE AFFIRMED.

Dated: New York, New York
November 17, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

STANLEY L. KANTOR
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

JEANETTE MARCELINA , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Respondent-Appellee
herein. On the 17th day of November , 1975 , she
served the annexed upon the following named person :

James J. McDonough, Esq.
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York

Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
the Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that purpose.

Jeanette Marcelina

Sworn to before me this
17th day of November , 1975

[Signature]
Assistant Attorney General
of the State of New York